

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5

JOSEPH WALSH,) 3:15-cv-01666-SI
)
Plaintiff,)
)
vs.) December 21, 2015
)
BRYANT ENGE, et al.,)
)
Defendants.) Portland, Oregon

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES

FOR THE PLAINTIFF: Joseph Walsh, Pro se
7348 SE Division Street
Portland, Oregon 97206

FOR THE DEFENDANTS: David Landrum
Daniel Simon
1221 SW Fourth Avenue, Suite 430
Portland, Oregon 97204

COURT REPORTER: Dennis W. Apodaca, RDR, RMR, FCRR, CRR
United States District Courthouse
1000 SW Third Avenue, Room 301
Portland, OR 97204
(503) 326-8182

1 (December 21, 2015)

2 P R O C E E D I N G S

3 (Open court:)

4 THE CLERK: Your Honor, this is the time set for
5 argument in civil case 15-1666-SI, Walsh versus Enge, et al.
6 For the record, we have Mr. Joseph Walsh appearing, present pro
7 se. Counsel for defendant, would you please identify yourself
8 for the record.

9 MR. SIMON: Good morning, Your Honor. Dan Simon for
10 the City of Portland.

11 MR. LANDRUM: David Landrum, one of the city
12 attorneys, for the City of Portland also.

13 THE COURT: All right. Good morning, everyone. Good
14 morning, Mr. Walsh. I think the last time I saw you in this
15 courtroom was the early part of 2014 when you gave testimony in
16 the U.S. versus City of Portland matter; am I correct?

17 MR. WALSH: Yes, Your Honor.

18 THE COURT: Welcome back, sir.

19 MR. WALSH: All right.

20 THE COURT: If you want, there should be fresh water
21 in the pitchers for both sides and glasses.

22 I have read all of the materials. We have pending
23 cross-motions for summary motion on Mr. Walsh's complaint. It
24 doesn't matter to me who begins the oral argument. It is my
25 intention to give both sides a full and fair opportunity to be

1 heard on their arguments. I do have some questions to either
2 Mr. Simon or Mr. Landrum or Mr. Walsh. Any preference on who
3 goes first?

4 MR. WALSH: I have no preference.

5 THE COURT: Okay. Mr. Simon, do you?

6 MR. SIMON: We don't have a preference either,
7 Your Honor. I am happy to go first.

8 THE COURT: All right. It is the defendants' motion
9 for summary judgment. We have plaintiff's cross-motion, you
10 may proceed.

11 MR. SIMON: Thank you, Your Honor. My name is
12 Dan Simon. Mr. Landrum is here to answer questions. I will be
13 arguing the motion on its merits today. The City has moved for
14 summary judgment on multiple grounds. The first ground is
15 justiciability; the second is that this conduct is not
16 protected by the First Amendment; and third, the City's
17 exclusion process is a permissible exercise of governmental
18 authority under the First Amendment.

19 To start with justiciability, this case arises out of
20 a 60-day exclusion from City Hall that the City issued on
21 July 15, 2015 for Mr. Walsh. That exclusion expired in
22 September of 2015, and Mr. Walsh is currently able to appear
23 and testify before City Council at City Council meetings
24 without restrictions.

25 Our justiciability argument is that a decision by

1 this Court would not have any effect on Mr. Walsh's current
2 right to appear and testify before the City Council. I want to
3 emphasize that our justiciability arguments encompasses both
4 mootness and standing.

5 Regarding mootness, we understand that there is an
6 exception that a case is capable of repetition, that it is
7 being reviewed or may receive a decision, but the burden is on
8 Mr. Walsh to show that this case fits into the cases of
9 repetition exception. For Mr. Walsh to argue that he will be
10 subjected to an exclusion in the future, he must implicitly
11 concede that he will disrupt future City Council meetings. The
12 fact that his case relies on speculative future events means he
13 hasn't shown a concrete injury based on present facts, which is
14 an essential element of standing.

15 Your Honor, in every incident in the record, which we
16 have provided to you, Mr. Walsh had an opportunity to testify
17 before the Council so long as he stays on message. At no point
18 was he prevented from speaking to Council at those meetings on
19 the items that he had testified on. It was only when his
20 communication escalated beyond the subject of his testimony
21 into disruptive behavior that his testimony was then barred.
22 His disruptive behaviors, as we have shown in the record,
23 through the videos and transcripts --

24 THE COURT: And I have watched the videos.

25 MR. SIMON: Thank you, Your Honor. So I won't go

1 into detail about what's on the video since Your Honor has seen
2 the record.

3 These outbursts, Your Honor, are not protected by the
4 First Amendment because they don't carry any standalone
5 message. The First Amendment protects conduct that is intended
6 to convey a particularized message. It is the City's position
7 that there is no message in making a scene and causing the City
8 Council meeting to come to a halt. That is simply an
9 amplification of the message that Mr. Walsh is trying to
10 portray, and that doesn't carry any First Amendment protection.

11 If Your Honor gets past those first two arguments,
12 then we get to --

13 THE COURT: Let me ask you a question about standing,
14 because you didn't really specifically talk about standing that
15 I heard. Don't we need to measure standing at the time the
16 complaint was filed, and the time the complaint was filed he
17 had standing to challenge the 60-day order, doesn't he?

18 MR. SIMON: Your Honor, I will defer to Mr. Landrum
19 on this question.

20 MR. LANDRUM: Let me see, Your Honor. The complaint
21 looks like it was filed on September 15th, and we are saying
22 that it was issued on the 17th. So it expired 60 days later in
23 November, and so I think that's correct. I think it was in
24 place when he filed his complaint.

25 THE COURT: I think so too. I don't think there is

1 any merit to the standing argument.

2 MR. SIMON: Thank you, Your Honor.

3 THE COURT: You may proceed.

4 MR. SIMON: Then talking about the First Amendment
5 argument, the authority for the City's exclusion process is
6 provided by two sections of Portland City Code. Section 315.20
7 provides that persons in charge may exclude any person who
8 fails to comply with the rules of conduct for city buildings.
9 Section 5.36.115 designates persons in charge of city property
10 within each commissioner's assigned bureaus and departments,
11 and so the two individually named defendants in this case,
12 Mayor Charlie Hales, is commissioner in charge of Office of
13 Management and Finance, which has jurisdiction over City
14 properties, and Mayor Hales has designated Bryant Enge as the
15 person in charge for the purpose of exclusions.

16 The notice for exclusions is provided in the Rules of
17 City Conduct for city properties, which states that a person
18 can be excluded for various periods of time for violating the
19 rules of conduct.

20 THE COURT: I didn't follow that. I thought it said
21 that they can be excluded for any period of time up to and
22 including permanent exclusion. Am I mistaken?

23 MR. SIMON: That's correct, Your Honor. I meant
24 various periods of time since that -- we can exclude for a
25 length of time up to a permanent exclusion.

1 THE COURT: Does the plaintiff have the ability, even
2 though he was only excluded for 60 days, to challenge the
3 provision in the ordinance that would allow the City to
4 challenge on a permanent basis?

5 MR. SIMON: He does, Your Honor. He has the
6 opportunity to appeal an exclusion to the City's Code Hearings
7 Office.

8 THE COURT: No, that's not what I meant. I
9 apologize. That's my mistake.

10 Does he have the opportunity to make the argument in
11 this court, in this hearing, on these motions that, even though
12 he was only excluded for 60 days, and that's serious enough,
13 and we will talk about that in a few minutes. But in theory,
14 the ordinance gives the City the right to exclude someone
15 permanently. Does he have the ability to challenge that in
16 this proceeding, in this litigation, and if so, how can the
17 City possibly defend its right to give a permanent exclusion?

18 MR. SIMON: I believe he does have the opportunity to
19 challenge that in this courtroom, Your Honor.

20 THE COURT: So maybe you will get to it when we get
21 to the reasonableness of the restriction, but I'm looking at a
22 couple of questions. One is, is a 60-day restriction
23 reasonable? By the way, I'm going to start out -- I don't
24 think Mr. Walsh disagrees with this, but when it is his turn to
25 speak, he can confirm or deny. I think he even agrees that if

1 a person is being actually disruptive during a hearing, the
2 presiding officer or someone delegated with authority can
3 remove someone who is actually being disruptive, and that
4 doesn't violate the First Amendment.

5 So the real question here, point one, does the
6 ordinance, as applied here, where there was a restriction that
7 he may not return to a City Council meeting for 60 days, even
8 if he is not going to be disruptive, does that violate the
9 First Amendment? Relatedly, the second question is, is the
10 ordinance facially invalid because it allows, not only for
11 future exclusions such as here for 60 days, but also in theory
12 up to a permanent exclusion? Those are some of the things in
13 my mind. I would be interested in your perspective.

14 MR. SIMON: Thank you, Your Honor.

15 To address the first question, I will refer to the
16 case of Reza v. Pearce from the Ninth Circuit, which I believe
17 is the most recent comprehensive statement of exclusion laws
18 and exclusion procedures within the Ninth Circuit.

19 THE COURT: I think you are right.

20 MR. SIMON: Reza v. Pearce is a case where an
21 individual who is viewing an Arizona State Senate proceeding
22 from an overflow chamber was applauding and booing during the
23 Senate proceeding. He was identified by Senate staff as an
24 individual that was disrupting the hearing. That information
25 was then conveyed to the Arizona state senator. The Arizona

1 state senator then gave the disruptive individual an indefinite
2 exclusion from the Arizona state Senate building.

3 Later the Arizona state Senate proffered rules that
4 suggested that exclusions would be kept to two weeks, but it
5 wasn't clear in Reza v. Pearce whether that applied to the
6 plaintiff in that case. Reza, in the City's view, represents
7 an extreme example of an exclusion policy at work. The Ninth
8 Circuit in that case identified a factual question over whether
9 or not the plaintiff had actually disrupted the proceeding.

10 The Government in that case had not shown that there
11 was a legitimate concern that the plaintiff would disrupt
12 future meetings, so the Government can not justify the lengthy
13 exclusion of the plaintiff in that case.

14 THE COURT: Didn't the Ninth Circuit go even further,
15 in particular, on page 506 on that case, the majority opinion
16 states in the third paragraph under (2), Ninth Circuit law at
17 the time of Senator Pearce's conduct. In that third paragraph,
18 the Ninth Circuit writes in the final sentence, "No cases in
19 the Ninth Circuit or otherwise even remotely suggest that
20 Norse's principle can be inverted to indefinitely ban an
21 individual from a government building based on a single
22 disruption of a hearing."

23 What do I make of that?

24 MR. SIMON: Your Honor, I believe that statement
25 addresses a situation such as the Court faced in Reza.

1 However, I do believe also that our situation is
2 distinguishable.

3 THE COURT: Because there were multiple instances?

4 MR. SIMON: One, because there were multiple
5 instances; two, because the Mayor who issued these exclusions
6 was a direct witness to all of these instances. I also want to
7 point to a quote in the dissent of Reza, which is found at page
8 510, which is, "After reviewing our law at the time, the
9 majority concludes that 'no cases in the Ninth Circuit'" --

10 THE COURT: Slowly. When you read out loud from
11 text -- we all have this problem -- we tend to read too
12 quickly. When we have a court reporter, reading too quickly
13 jeopardizes the accuracy of the transcript. Let me ask you to
14 start that quote again slowly.

15 MR. SIMON: Thank you, Your Honor. "After reviewing
16 our law at the time, the majority concludes that no cases, in
17 the Ninth Circuit or otherwise, even remotely suggests that
18 Norse's principle can be inverted to indefinitely ban an
19 individual from a government building based on a single
20 disruption of a hearing.

21 "But this answers the wrong question, and it is
22 ultimately a red herring. The fact that no cases affirmatively
23 permitted an official to ban an individual from a government
24 building based on a single disruption, the majority's
25 conclusion, is irrelevant for purposes of qualified immunity.

1 Instead, the relevant question is whether any case expressly
2 prohibited an official from banning an individual from a
3 government building for a single disruption. None of our cases
4 at the time of the hearing in question answer that question."

5 The Ninth Circuit dissent then goes on to discuss the
6 history of the cases, *White v. City of Norwalk*, *Kindt v. Santa*
7 *Monica Rent Control Board*, *Norris v. City of Santa Cruz*, and
8 ultimately concludes that none of those cases say anything
9 about whether an official can ban an individual from future
10 meetings as a result of an actual disruption.

11 THE COURT: I have read those cases several times. I
12 have read that dissent. As, of course, you know, that is a
13 dissent, and it seems like it may very well be a question of
14 first impression in the Ninth Circuit, and as far as I found,
15 in cases throughout the country.

16 Are there any appellate decisions that you are aware
17 of that -- let's start with that -- that uphold the authority
18 of a governmental official, maybe in the context of a City
19 Council meeting or something, that is appropriately analogous
20 to exclude someone who was shown to be actually disruptive from
21 attending future meetings?

22 We will talk to Mr. Walsh in a few minutes, but I
23 think it is pretty darn clear that if someone is being
24 disruptive in a meeting, actually disruptive in a meeting, they
25 can be removed from that meeting for the duration of that

1 meeting, and that does not violate First Amendment rights.

2 What I'm troubled by is the prospective exclusion
3 order, and I don't see any appellate decisions anywhere that,
4 at least in the context of a limited public forum, such as the
5 City Council meeting, that upholds prospective exclusions. I
6 say "limited public forums," and I think that distinguishes a
7 Tri-Met-type situation where you are talking more about access
8 to services. But where you are actually in a limited public
9 forum speaking to a governmental body, are you aware of any
10 appellate case law that would uphold or allow prospective
11 exclusions beyond the date and time of the meeting itself where
12 the person was actually disruptive?

13 MR. SIMON: Your Honor, we will acknowledge that we
14 do not have a case that says that.

15 THE COURT: And I'm not aware of it either. So what
16 I'm hearing the City urging to me is they want me to be the
17 first Court in the country to acknowledge that prospective
18 exclusions do not violate the First Amendment, and they are not
19 citing any precedent that would support that, and that's given
20 me heartburn. You can try to make me feel more comfortable.

21 Go ahead.

22 MR. SIMON: Your Honor, I will point to -- it is not
23 an appellate case, but it is a District of Oregon case. It is
24 the case of Mead v. Gordon. That's at 583 F.2d 1231.

25 THE COURT: That's Judge Papak's case involving the

1 disruption at the Washington County Courthouse. I think that's
2 arguably factually distinguishable. I will read that several
3 more times. I think it is a different situation. If I recall
4 it correctly, the person wasn't even completely excluded from
5 going back to Washington County Court as long as they had
6 someone to accompany them to deal with a threat issue; am I
7 correct?

8 MR. SIMON: Your Honor, I believe there were some
9 discrete circumstances in which the plaintiff in Mead was
10 allowed to return to the courthouse. I believe one of those
11 was whether that person was a party to a court proceeding. I
12 believe that also that person would be allowed to travel in the
13 courthouse so long as they had a security escort.

14 THE COURT: Right. That's what I'm thinking of too.
15 It sounds like an interesting sort of ad hoc solution to that
16 problem. As far as I know, that case did not go up on
17 appellate review.

18 MR. SIMON: That's correct.

19 THE COURT: Obviously, No. 1, it is not binding on
20 me. No. 2, I will take a look at it for whatever persuasive
21 value that it may have. But you didn't cite any appellate
22 cases that support the proposition that a prospective exclusion
23 of a limited public forum is admissible. I'm familiar with
24 that case, among others. I will re-read that one too.

25 MR. SIMON: Your Honor, another case that I will cite

1 to you, which was affirmed by the Ninth Circuit, is the case of
2 Rosebrock v. Beiter, 788 F.Supp. 2d 1127, which is affirmed at
3 745 F.3d 963, and that is citing Supreme Court --

4 THE COURT: Let me hear those cites again. 788 --

5 MR. SIMON: 788 F.Supp.2d 1127.

6 THE COURT: It was affirmed at what cite?

7 MR. SIMON: 745 F.3d 963.

8 THE COURT: That's Ninth Circuit you say?

9 MR. SIMON: Correct.

10 THE COURT: I'm not familiar with that case. Tell me
11 about it.

12 MR. SIMON: That case is citing a Supreme Court case
13 of Cornelius v. NAACP Legal Defense and Educational Fund.

14 THE COURT: That case, I know.

15 MR. SIMON: In that case, the District Court opinion
16 at 1139, that cited Cornelius. It said, "The Supreme Court has
17 held that the mere possibility of disruptions and controversies
18 is sufficient justification to deny access to a nonpublic
19 forum."

20 THE COURT: I'll take a closer look at that.

21 MR. SIMON: That's Rosebrock.

22 THE COURT: I'll take a closer look at that. I'm not
23 familiar with that.

24 MR. SIMON: It is cited in our motion for summary
25 judgment at page 22.

1 THE COURT: I did read a lot of the cases. I must
2 have missed that one.

3 MR. SIMON: I also want to point to a Supreme Court
4 case. The case is -- pardon me, Your Honor.

5 THE COURT: In Rosebrock, can you tell me what the
6 holding was? The language there, was that dicta? If you don't
7 know, that's all right. I will go back and read it.

8 MR. SIMON: Yes, Your Honor. I will refer to page 22
9 of our motion for summary judgment for the discussion there.

10 THE COURT: One moment. Let me take a look at it.

11 I don't quite see the answer to my question on page
12 22. I will take a look later.

13 MR. SIMON: About halfway down, I do want to point to
14 the citation of Perry Education Association v. Perry Local
15 Educators' Association. The quote there, "There is no showing
16 in the record of past disturbances or having a future
17 disturbance would be likely. We have not required such proof
18 be present to justify the denial of access to a nonpublic forum
19 on the grounds that the proposed use may disrupt the property's
20 intended function."

21 THE COURT: We are dealing with a limited public
22 forum.

23 MR. SIMON: Yes, Your Honor.

24 The other case that I want to point to from the
25 Supreme Court is Minnesota State Board for Community

1 Colleges v. Knight. At page 283 and 284 of that case, it
2 states, "The Constitution does not grant to members of the
3 public generally a right to be heard by a public body making
4 decisions of policy."

5 So the First Amendment does not confer any
6 affirmative right for Mr. Walsh to testify on items before the
7 City Council in person at the precise moment that those items
8 are being heard.

9 There are alternative methods for communication
10 prescribed in the City's exclusions. Mr. Walsh still had the
11 opportunity to view testimony of City Council meetings on line.
12 He may submit testimony in writing in advance of a City Council
13 hearing, and he also may schedule business with city personnel
14 at alternative locations.

15 THE COURT: Counsel, so let me ask you, the exclusion
16 order here, was that to punish him for being disruptive at the
17 prior hearings?

18 MR. SIMON: No, Your Honor.

19 THE COURT: Then what was the purpose of the 60-day
20 exclusion?

21 MR. SIMON: The purpose was to preserve the order and
22 decorum of City Hall and the safety of its attendees.

23 THE COURT: So why isn't the decorum and safety
24 preserved by excluding him when he was disruptive?

25 MR. SIMON: Because, Your Honor, of the history of

1 disruption and the increased possibility for future disruption.
2 We're facing a situation where the plaintiff can enter a
3 City Council meeting, disrupt the City Council meeting, cause
4 the City Council meeting to grind to a halt while he is
5 removed, and then come back to another City Council meeting and
6 then simply repeat the same process.

7 THE COURT: I'm not following this, because you
8 didn't exclude him permanently, as the ordinance seems to
9 permit. You excluded him for 60 days. So on day 61 he could
10 come back and do exactly what you don't want him to do. So
11 what's the real purpose of the 60-day exclusion?

12 MR. LANDRUM: If I may, Your Honor.

13 THE COURT: You may.

14 MR. LANDRUM: The purpose is not to punish Mr. Walsh
15 by inflicting some kind of difficult burden on him, but there
16 is an element to this that suggests to Mr. Walsh perhaps you
17 ought to let other people take their turn in addressing the
18 Council. Then you can take your turn in addressing the
19 Council. And then the Council may take its turn in addressing
20 the people who are present in a way that lets us get out of
21 Council meetings before late, after dark.

22 THE COURT: I don't disagree with that one bit.
23 That's why when anyone has been shown to be actually
24 disruptive, they can and probably, in my opinion -- I probably
25 shouldn't say this, but I am going to -- they should be removed

1 if they are actually disruptive.

2 Now, what seems to me, though, by then entering the
3 prospective order saying you can't come back for 60 days is to
4 say, "And if you are going to be disruptive, there is going to
5 be some penalty attached. There is going to be some
6 punishment. You're going to lose your ability to speak to us
7 even without being disruptive for 60 days," maybe even with the
8 implied threat that if you come back, and you're disruptive on
9 day 61, maybe it will be 90 days. Do it again, it might be 120
10 days.

11 So there seems this concept that you are going to
12 lose some of your rights. You are going to lose some of your
13 privileges because of the way you have previously behaved in
14 order to try to deter future offenses. Now, I don't know
15 whether that is or isn't offensive to the First Amendment. I'm
16 still struggling with that. But I'm trying to find out what
17 the purpose of the 60-day exclusion order is. That's the only
18 thing I could come up with.

19 MR. LANDRUM: Well, before I turn it back over to
20 Mr. Simon, because I told him I would.

21 THE COURT: You can tag team all you want.

22 MR. LANDRUM: Two things: First thing, it is
23 inherent in the nature of the rule that, depending on the
24 conduct displayed by the person present at the City Council
25 meeting, some escalating response can be had, depending on what

1 you are doing and how often you do it.

2 But it is just inherent with the rule that, while
3 you're gone, we are going to try to get in some City Council
4 meetings that go along the agenda, and we don't have to stop to
5 run anybody out of the chamber because they are putting a brake
6 on the meeting. Then once we have done that and 60 days has
7 come up, "Welcome back, Mr. Walsh," and we will try it again.
8 I think it is both inherent in this language in the rule. It
9 is also inherent in the authority of the governing city body to
10 carry out its business.

11 THE COURT: Now, I take it that it is the City's
12 position obviously that a 60-day exclusion is not an
13 unreasonable restriction. We know that in a limited public
14 forum -- and that's what we're dealing with here -- in a
15 limited public forum, the restrictions have to be both
16 reasonable and viewpoint neutral. Nobody is arguing that it is
17 not viewpoint neutral. I think it is viewpoint neutral.

18 So the question is, is the 60-day exclusion
19 reasonable? Obviously I think by the City's position here,
20 they have to be taking the position that 60 days is reasonable,
21 right?

22 MR. LANDRUM: Yes, that's correct.

23 THE COURT: Would 90 days be reasonable under these
24 circumstances?

25 MR. LANDRUM: Maybe not, but we haven't gotten there

1 yet with Mr. Walsh. We weren't ready for 90 days yet this
2 time; this was his third one.

3 THE COURT: I have to figure out -- and I don't think
4 you disagree with this -- whether 60 days is reasonable. If
5 you tell me that 90 days might not be reasonable, now I need to
6 figure out, okay, why might 90 days not be reasonable, but 60
7 days is?

8 I'll start out by granting you, if we're in the
9 middle of a City Hall meeting, and Mr. Walsh or anyone else is
10 actually disruptive, there's every right under the
11 First Amendment to remove them for the duration of that
12 meeting. There's no doubt about it in my mind, and there is
13 plenty of Ninth Circuit precedent to that effect.

14 So we know that removing someone for the duration of
15 the meeting is not unreasonable. You tell me that removing
16 them for 90 days, even with a pattern of several prior
17 incidents, might not be reasonable. You say that 60 days is.
18 I'm trying to figure out, why is 60 days reasonable? Why not
19 30?

20 MR. LANDRUM: Because -- I'm sorry.

21 THE COURT: Go ahead.

22 MR. LANDRUM: Because we already tried 30 with him,
23 and that didn't work.

24 THE COURT: Your position is, if you remove him from
25 one meeting, that should be sufficient. If he continues or

1 someone continues to be actually disruptive, you can try to
2 increase it a little bit more. If that solves the problem,
3 good. But if they continue to be actually disruptive, then you
4 can ratchet up the length of the exclusion. Maybe if 60 didn't
5 work, next time you exclude him for 90. If that didn't work,
6 maybe you exclude him for 180, and then eventually exclude
7 somebody maybe permanently. Is that the City's theory here on
8 how to evaluate reasonableness under the First Amendment?

9 MR. LANDRUM: I would offer two things about that,
10 Your Honor. First of all, because it is similar to the
11 Washington County Circuit Court in Mead -- they were
12 escalating. It is a reasonable, rational ad hoc response to an
13 actual problem, so in that way, yes.

14 THE COURT: Although Mead is not precedent here.

15 MR. LANDRUM: I understand that Mead is not
16 precedent.

17 THE COURT: I am trying to deal with what the legal
18 criteria are and the fact that another trial court in Mead
19 approved something that never went up on appeal.

20 MR. LANDRUM: I'm not trying to argue that Mead is
21 some kind of authoritative review, but I'm trying to echo
22 something that you said to us a few minutes ago, which was that
23 was an ad hoc approach to an immediate, practical problem.

24 THE COURT: By the way, don't misunderstand me. That
25 was also not a statement by me that Mead was correct under the

1 First Amendment.

2 MR. LANDRUM: I understand that also, Your Honor.
3 I'm saying that's what makes the approach by the City, because
4 this is an actual practical problem. The bus needs to get
5 there by 6:30, and it can't get there because someone is
6 standing in front of it. The only people that get to deal with
7 that and make the bus get there as close to 6:30 as they can
8 are the five people sitting at the desk in the City Council
9 chambers, and they are trying to do that working with what they
10 have. No. 1, it is just simply a practical response to
11 practical problems.

12 THE COURT: That's what I don't understand, and here
13 is why. Although I don't have any in this hearing, but I will
14 have it in other hearings. We will have courtroom security
15 officers here, U.S. Marshals here, if there are any problems.
16 If you have a Council security officer there, and the very
17 first time that anybody is actually disruptive, especially if
18 it is Mr. Walsh with a history, you say, "I am sorry,
19 Mr. Walsh. You have been disruptive in this hearing.
20 Security, remove him." Then you go on and continue running
21 your bus. Why isn't that a solution that solves the problem
22 that you have identified without doing undue offense to the
23 First Amendment?

24 MR. LANDRUM: Two problems: One, the security in the
25 City Hall, they are not part of the Police Bureau. They are

1 contracted security services. They don't have any more
2 authority than I do to put their hands on Mr. Walsh and make
3 him leave the City Council chambers. If he doesn't want to,
4 then we have got to bring in a police officer and go down the
5 trespass road. And that happens. That just adds to the time
6 that the City Council and everybody there is sitting around and
7 tapping their feet while Mr. Walsh holds it hostage.

8 So the description of the idea -- one time
9 Judge Baker, when I was in her courtroom, turned to the clerk
10 and said, "Call the guard," and the clerk barely reached for
11 the phone, and the guard came through the backdoor of the
12 courtroom and things settled down. City Council chambers don't
13 quite work that way, but almost.

14 Now, another thing I was going to offer about this is
15 the varying length of time for the exclusion and whether the
16 City is going to make an exclusion for one meeting or 30 days
17 or 60 days or permanent is also in the response to what the
18 actual disruptive conduct is. Now, without naming names and
19 going into detail, we recently had an event that involved
20 somebody putting hands on somebody else. Well, that's it. We
21 can't really --

22 THE COURT: I agree. So why don't we just call the
23 police, call the DA, and have that person prosecuted for
24 battery?

25 MR. LANDRUM: In that instance we did. The point I'm

1 trying to make is, that's not the problem that we had with
2 Mr. Walsh, and so we don't want to go to that option right away
3 because it doesn't merit that option right away. It merits a
4 different option.

5 THE COURT: I understand the problem. I'm just not
6 so sure that the First Amendment gives that kind of leeway and
7 that kind of discretion under these circumstances. I am
8 concerned that there is no appellate precedent that says it
9 does.

10 MR. LANDRUM: Unless you have another question, I'm
11 going to turn it back over to Mr. Simon.

12 THE COURT: Very good.

13 Mr. Walsh, let me give Mr. Simon a few more minutes,
14 and then I'll turn to you.

15 Mr. Simon, concluding remarks, and I will let you
16 rebut after Mr. Walsh.

17 MR. SIMON: Thank you, Your Honor.

18 I believe Mr. Landrum has now addressed many of
19 Your Honor's questions. I will add that if this Court were to
20 completely invalidate the City's exclusion policy from a facial
21 standpoint, the City would be in the difficult in regards to
22 its ability to conduct business sufficiently and safely.

23 If there is a means for the City to be able to
24 restrict access to individuals with known histories of
25 disruptive behavior, that leaves to the aforementioned

1 situation where a person can simply -- if they are intent on
2 disrupting City Council -- can simply return nonstop and repeat
3 this process ad nauseam.

4 The City would also have no means restricting the
5 access to individuals who are physically disruptive as well as
6 verbally, as in the situation that Mr. Landrum described. An
7 individual who has been physically aggressive towards city
8 personnel or other citizens at that meeting, they would be
9 allowed entry into the City Council chamber, and they would be
10 allowed to be in close proximity to their previous targets of
11 their physical aggression. In both situations, the right of
12 both the City Council to conduct its business sufficiently and
13 the rights of others to appear and testify before the City
14 Council are affected.

15 We believe that the exclusion policy is a
16 content-neutral means of maintaining the government's ability
17 to conduct that safe and efficient business.

18 THE COURT: I agree. I think it is content-neutral.

19 MR. SIMON: We, in the record, have shown you that
20 this is a unique situation where the plaintiff has a documented
21 and undisputed history of disrupting City Council meetings and
22 then refusing to alter his disruptive behavior despite any
23 actions taken against him to minimize or remove that conduct.
24 So the City asks that you grant its motion for summary judgment
25 and deny plaintiff's cross-motion.

1 THE COURT: Thank you very much, Mr. Simon.

2 Mr. Walsh. You may either stand or remain seated,
3 whatever is more comfortable for you, sir.

4 MR. WALSH: I will start from the sitting position.
5 I have to apologize for my voice. I have been on oxygen now
6 for eight years, and I take a lot of medications. Apparently
7 it is affecting my voice box, but you can understand me. It is
8 a little bit difficult for me to get some of the words out.
9 Sometimes my presentation will go from whisper to yelling. I
10 get into a lot of trouble over that, because people do not
11 understand it. However, I would ask just some patience.

12 THE COURT: I will. I will give you a
13 recommendation, but also ask for a favor. If you have a
14 choice, I would prefer a whisper to yelling.

15 MR. WALSH: I will try to do that.

16 We agree with the Court that we are not arguing that
17 if my behavior in the City Council meetings is inappropriate in
18 the eyes of the presiding official, that he or she has the
19 option to remove me. They've removed me three times. I have
20 never been arrested on all three occasions. So, therefore, it
21 is at least implied that I have cooperated on some level. They
22 ordered me out, and I left -- sometimes with resistance,
23 sometimes mouthy, buy I did leave. They never called the
24 police. I was never arrested. I was escorted out by the
25 security people, and some of the security people weren't very

1 friendly with me.

2 Now, the City has spent a lot of time, about
3 70 percent of their brief, telling you how bad I am. I
4 represent individuals for justice that represents a group of
5 people that monitor, among other things, City Hall.

6 I have attended through three mayors -- Mayor Potter,
7 Mayor Sam Adams, and Mayor Hales -- I calculate that I have
8 attended about 400 City Council meetings. They, the City,
9 report to you three instances. I think if my math is right,
10 and I was never great at math, that's 1 percent.

11 How can any reasonable person say that I've attended
12 400 meetings, three of them that I was a little bit obnoxious,
13 and I was taken out and blocked from that meeting that day as
14 punishment, and then on top of that was issued an exclusion, an
15 exclusion based on a code of conduct that was written by a city
16 employee that has 19 items on it, and if you turn the wrong
17 way, they can nail you. It is so encumbering, so general, that
18 the First Amendment is turned on its head.

19 It is a semi-private or public forum. That was new
20 to me. I thought it was public.

21 THE COURT: The technical term, it is called a
22 "limited public forum."

23 MR. WALSH: Limited public forum. That was new to
24 me. I did not know that.

25 However, during the time of public testimony, I

1 think -- my opinion -- it becomes a public forum. I may be
2 wrong on that. However, that's the attitude that I went in. I
3 was entitled to my three minutes. In the last incident of the
4 60 days -- and that's what we are really appealing on this.

5 THE COURT: The removal from the consent agenda.
6 Then you stepped out to address some medical issues, and they
7 had already moved past you.

8 MR. WALSH: But they were aware of the medical
9 issues. My oxygen was still there, so they knew. They did not
10 want to talk about this item. This item was \$100,000 being
11 moved from Transportation to Police Overtime. They did not
12 want to do it. Is it too loud?

13 THE COURT: Yes.

14 MR. WALSH: They did not want to talk about that.

15 Now, all I did was yell from the audience to the
16 Mayor, "What happened to the agenda item?" And they said, "You
17 weren't here. We voted on it. It is gone. It is finished.
18 You cannot talk about it."

19 I was the one who called it. I have a right to talk
20 about that. They held it up for two hours. If you look on the
21 charter, the charter says that a consent to agenda items are
22 No. 3 on the agenda. It is about a half hour into the meeting.

23 It also says that if somebody pulls an agenda item,
24 it must be considered right after the vote of the others, which
25 means about maybe another ten minutes.

1 What Charlie Hales does, he moved it all the way in
2 the back under regular base, and that means that you have to
3 wait two to three hours to talk three minutes about something
4 you object to. What happens? People leave. They don't have
5 the three hours. Unfortunately for Charlie Hales, I'm retired,
6 so I can stay. Again, they tell you how bad I am, and I'm not
7 that bad. I have holes in my tongue from biting it at some of
8 these meetings.

9 The reason that I got so upset on that one, it was
10 playing what they did. It was so playing, because there were
11 no apology. "Gee, Mr. Walsh, I didn't know you were here. I'm
12 sorry." They said, "No, you were out of the room; too bad."

13 THE COURT: Mr. Walsh, let me ask a procedural
14 question --

15 MR. WALSH: Let me just finish this.

16 THE COURT: Okay.

17 MR. WALSH: There is a man sitting here today,
18 Mr. Davis. Mr. Davis has been permanently barred from
19 City Hall, and his crime was videotaping an arrest taking place
20 at City Hall. That was his crime. They told him to leave. He
21 said, "No, I have a right to videotape and record this." They
22 said, "No, you don't; arrest him." They arrested him, and now
23 he is permanently barred.

24 These guys are going after activists, Your Honor. We
25 have four activists now that are either excluded or barred.

1 And if you try to do the appeal, they will claim mootness,
2 because you cannot get the appeal on a 10-day or a 15-day, and
3 so they will run the clock out. Then they claim mootness. So
4 it is a trap door.

5 THE COURT: By the way, it is easier to claim
6 mootness in a state court in Oregon because of the Oregon state
7 law procedures. In federal court, as Mr. Simon described, we
8 do have the doctrine of capable of repetition yet evading
9 review. So federal lawsuits are more difficult to become moot.
10 Unfortunately, or fortunately -- I'm not going to comment on
11 state law -- but under state law, under the Oregon Supreme
12 Court rulings, it is easier for a dispute to become moot.

13 MR. WALSH: We just had a decision in our state
14 Supreme Court that brings it in line with the federal courts.
15 We were the last state to do it. There were 49 other states
16 that already did it, but we just did it about four months ago.
17 That's the e-mail that you got from the Auditor's Office,
18 because I asked for a clarification on that, because the
19 Auditor's Office runs the Hearing Office. My question to the
20 auditor was, if the Supreme Court now, in Oregon, is saying
21 that you cannot claim mootness anymore, you have to comply with
22 the federal, what does that mean? And she came back and she
23 says it's dead.

24 THE COURT: All right. I will say I have not been
25 staying on top of that issue in state court.

1 Let me ask you a procedural question.

2 MR. WALSH: All right.

3 THE COURT: I really have not yet made up my mind
4 what I'm going to do about this case. You have heard some of
5 my concerns. But let me ask you, in your complaint, and I
6 appreciate the fact that you are representing yourself, you
7 don't have a lawyer, so it is a little bit unclear to me. I'm
8 not being critical of you, but I want to see if I can clarify
9 something.

10 If I were to agree with your First Amendment
11 challenge to the ordinance here that excluded you for 60 days,
12 No. 1, I would make a declaration to that effect. No. 2, I
13 might very well enter what's called a permanent injunction
14 enjoining the enforcement of the ordinance as it is presently
15 written. But it is also possible, and I don't know if this is
16 what you want, I don't know whether this would be a waste of
17 time for you or anybody else, it is also possible that if I
18 were to agree with your First Amendment analysis, that you
19 would have a right to a jury trial on whether or not you are
20 entitled to any money damages for a violation of your
21 constitutional rights.

22 If you ask for a jury trial, and you have a right to
23 a jury trial, a jury would decide whether or not you have any
24 right to money damages. But it is unclear to me whether that
25 is also part of what you are requesting in your complaint. Can

1 you clarify for me now, please, whether or not you are simply
2 requesting a declaration from this Court and a permanent
3 injunction against the City from this Court against the
4 ordinance, as currently drafted or as applied to you in this
5 case, or if you're also asking for a jury trial on money
6 damages. Can you clarify that for me?

7 MR. WALSH: I think so. I have no interest in money
8 at all. I have interest. I think that one man -- the Mayor --
9 should not have the power to decide whether he is going to
10 exclude me from City Council for 30, 60, or 90 days, or
11 permanently. It's up to him; it's totally subjective. They
12 base it -- they run it through the City Attorney to make it at
13 least somewhat legal.

14 But here is the question that we asked in our brief:
15 Does the Mayor have that kind of power? And if he does, what's
16 the restrictions on him?

17 THE COURT: Right.

18 MR. WALSH: To answer your question, no, I'm not
19 interested in money. I'm not interested in taking this to
20 trial. I am interested in you saying to me, "Mr. Walsh, the
21 Mayor had that power; too bad."

22 THE COURT: Yes.

23 MR. WALSH: Or, "No, he doesn't."

24 THE COURT: It is a very important question that you
25 raise. I'm not going to give the answer now orally from the

1 bench. I want to study these issues a bit more thoroughly. I
2 am going to write a written opinion about it. You will get one
3 in the mail. They will get a copy of the opinion as well.
4 Whoever doesn't like what I say has the right to appeal to the
5 Ninth Circuit.

6 I want to study these issues a little bit more. I am
7 going to give in a few moments, when you are done, I am going
8 to give Mr. Simon a final rebuttal. Then I am going to take
9 this matter under advisement and issue a written opinion
10 probably within 30 days, give or take.

11 Anything further, Mr. Walsh?

12 MR. WALSH: Thank you for your patience. The reason
13 that I didn't submit another brief at the end is I thought it
14 would be repetitious.

15 THE COURT: And I appreciate that. Thank you.

16 Mr. Simon, final words in rebuttal, and then I'll
17 take it under advisement.

18 MR. SIMON: Thank you, Your Honor. I want to remind
19 the Court that there is no due process claim at issue.

20 THE COURT: I understand. Plaintiff is alleging
21 First Amendment free speech.

22 MR. SIMON: I also want to clarify a point Mr. Walsh
23 made about another who was excluded.

24 THE COURT: You don't need to. I think that I really
25 understand the context. The only claim before the Court is

1 Mr. Walsh's claim and only based upon the 60-day order. In
2 fact, the prior instances with Mr. Walsh, that may be
3 background that led up to you. But the issue before the Court
4 is whether or not the City, under the ordinance, had the
5 authority to issue a 60-day exclusion to Mr. Walsh under these
6 circumstances.

7 MR. SIMON: Thank you, Your Honor.

8 THE COURT: I will make my opinion limited to that
9 question.

10 MR. SIMON: Thank you, Your Honor.

11 THE COURT: Thank you all very much. I appreciate
12 the written briefing. I appreciate the oral argument. I will
13 take it under advisement. I will do my best to release the
14 written opinion within about 30 days.

15 Thank you.

16 (End of proceedings.)
17
18
19
20
21
22
23
24
25

1
2 --oOo--
3

4 I certify, by signing below, that the foregoing is a
5 correct transcript of the record of proceedings in the
6 above-entitled cause. A transcript without an original
7 signature, conformed signature, or digitally signed signature
8 is not certified.

9 /s/ Dennis W. Apodaca
10 DENNIS W. APODACA, RDR, RMR, FCRR, CRR
11 Official Court Reporter

January 11, 2016
DATE

12
13
14
15
16
17
18
19
20
21
22
23
24
25